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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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February 28, 1974

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above entitled proceeding. NAB has received written permission to file such a brief from both parties to this case.

NAB is a non-profit association of radio and television broadcast stations and networks. As of February 20, 1974, NAB's membership included 2,366 AM radio stations, 1,473 FM radio stations, 529 television stations and all nationwide commercial

broadcast networks. The objective of the NAB, according to its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

All communications media share a common interest in the presence of substantial threats to the unfettered exercise of freedom of the press. The Florida statute in question in this case presents such an assault, for in the name of "fairness" it represents a severe restraint upon the exercise of journalistic editorial discretion by newspaper publishers. Thus, in keeping with the above-stated objectives, the NAB herein seeks to protect its members from the potential ramifications and "chilling effect" of government encroachments upon the press.

NAB respectfully submits that in addition to its mutual interests with newspapers in this case, the broadcaster has other concerns in the outcome of this matter which would not be adequately represented by Appellant. In particular, the broadcast media are now beset with an administratively conceived and judicially supported fairness doctrine. It is likely that some discussion of this doctrine will emerge in the course of this proceeding.[1] Thus, NAB is concerned that in determining the rights of newspapers and the constitutionality of the Florida "right to reply" statute, the

[1] *See, e.g.*, Appellant's Jurisdictional Statement at 20-27.

theoretical grounds upon which the fairness doctrine is based will come into issue.[2] NAB is of the opinion that judicial comments at this time will affect significantly the interests of commercial broadcasters to the extent that such comments may affect the fairness doctrine.

WHEREFORE, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above entitled proceeding.

Respectfully submitted,

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[2] The continued validity of the doctrine may be in question, *see, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring).

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF *AMICUS*

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of the Appellant herein. The interest of *amicus* NAB has been stated in full in the accompanying *Motion for Leave to File Brief Amicus Curiae.*

PRELIMINARY STATEMENT

NAB adopts the Statement of the Case as set forth in Appellant's Jurisdictional Statement at pages 5-7

NAB submits that the Florida "right to reply" statute, Section 104.38, which requires newspapers to publish, without charge, replies of political candidates whom they criticized during election campaigns, does violate freedom of the press as guaranteed by the First Amendment. Thus, NAB respectfully urges this Court to reverse the decision of the Supreme Court of Florida and thereby eradicate the severe restraints upon the exercise of journalistic discretion and its abridgement of a free press as imposed by the constitutionally infirm "right of reply" statute. In its review of the Florida statute, however, NAB urges the Court to render its decision within the confines of the First Amendment, without effecting further solidification of its 1969 decision in *Red Lion Broadcasting Co. v. F.C.C.*[1] wherein it established the constitutionality of the so-called fairness doctrine as applied to broadcast licensees by the Federal Communications Commission (FCC). *Red Lion* has come under increasing question and if it is to be revisited, it should be in a case involving application of the fairness doctrine to a broadcast station — not in a case involving the constitutional validity of a state statute encroaching upon the First Amendment rights of a newspaper.

ARGUMENT

I. IMPOSITION OF A RIGHT OF REPLY STATUTE FOR POLITICAL CANDIDATES IMPAIRS THE EXERCISE OF FIRST AMENDMENT RIGHTS BY IMPOSING A PRIOR RESTRAINT UPON THE PRESS.

By its decision, the Supreme Court of Florida would have us forsake the First Amendment in order to preserve the

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[1] 395 U.S. 367 (1969).

values it represents. Thus, it describes the "right of reply" statute as:

> . . . in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees.[2]

Even such "assurances," if the Florida statute be viewed as such, are, nevertheless, circumspect under the scope of the First Amendment:

> "In our early history one view was that the publisher must open his columns 'to any and all controversialists, especially if paid for it.' " Mott, American Journalism, 55 (1962) [quoting Benjamin Franklin].
>
> "Franklin disagreed, declaring that his newspaper was not a stagecoach, with seats for everyone; he offered to print pamphlets for private distribution, but refused to fill his paper with private altercations." *Ibid.* (citation omitted).[3]

And that philosophy, according to Justice Douglas, "became implicit in the First Amendment."[4] An affirmative

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[2] Tornillo v. The Miami Herald Publishing Co., 38 Fla. Supp. 80 (1973) as reproduced in Appellant's Jurisdictional Statement at app. A 18.

[3] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 152 (1973) (Douglas, J., concurring).

[4] *Id.*

requirement may still constitute a form of censorship and, more importantly, it may impose a "chilling effect" upon the free exercise of First Amendment rights.[5] Consequently, even an affirmative requirement must overcome the heavy presumption against its constitutional validity, the same as would any system of prior restraint of activities protected by the First Amendment.[6] *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971); accord, *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), *Near v. Minnesota,* 283 U.S. 697 (1931).

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[5] In Columbia Broadcasting, *supra,* Justice Douglas, in a footnote reference, stated:

> The monetary and other burdens imposed on the press by the rights of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down . . . . In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press or association.

Id. at 168, note 18 (Douglas, J., dissenting).

[6] Quoting Near v. Minnesota, 283 U.S. 697, 719-20 (1931), the Court in New York Times Co. v. United States, 403 U.S. 713, 723 (1971) stated:

> "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), this Court held that there is no right to access to the airwaves which would require broadcasters to accept paid editorial announcements. Similarly, in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the court held that a newspaper could not be compelled to accept and print advertising in the exact form submitted. Yet another alleged right of access was denied in *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967), as the court upheld the refusal of law review editors to accept a proffered article. These cases demonstrate that the imposition of an affirmative duty upon freedom of the press is not likely to be constitutionally valid.

It remains to be determined whether the Florida "right of reply" statute is capable of overcoming the presumption against its constitutional validity. NAB suggests that it cannot. As discussed in Appellant's Jurisdictional Statement at 16-20, there are few clear objectives of the statute. One raises the issue of a state's interest in fair elections. This Court in *Mills v. Alabama*, 384 U.S. 214 (1966), noted that:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes . . . . Suppression

> of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. *Id.* at 218-19.

Thus, the Court invalidated a state criminal statute prohibiting the solicitation of votes on election day.

Another purported objective of the Florida statute is to counter alleged media concentration and monopolization.[7] Justice Douglas noted, in *Columbia Broadcasting, supra,* that:

> Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative *fiat* not freedom of choice carries the day. *Id.* at 153 (Douglas, J., concurring).

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[7] *But see* statement by Thomas I. Emerson, a leading First Amendment scholar:

> " . . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression (1970), p. 671.

Columbia Broadcasting, *supra* at 151 (Douglas, J., concurring).

Similarly, Justice Stewart noted that:

> Even though it would be in the public interest for the respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. *Id.* at 144 (Stewart, J., concurring).

NAB respectfully suggests that the precedents clearly mandate the invalidation of the Florida statute as an unjustifiable encroachment upon the exercise of fundamental First Amendment rights.[8]

II. THE FLORIDA STATUTE IS CONSTITUTIONALLY INFIRM AND THE COURT NEED NOT AND SHOULD NOT BASE ITS RULING ON A REVISITATION OF ITS *RED LION* DECISION.

Implicit in the Appellant's arguments before the Court, as evidenced in its Jurisdictional Statement, is a call for

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8 What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press.

Columbia Broadcasting, *supra* at 160 (Douglas, J., concurring).

the reaffirmation of *Red Lion* with its distinctions among the various communications media in terms of First Amendment protections.[9] NAB submits that this is not the appropriate factual situation for revisiting that decision.

In the first place, the Florida statute here under review should be interpreted within the narrow confines of the First Amendment. As previously discussed, restraints upon the free exercise of First Amendment rights bear a heavy presumption against their constitutional validity. Those which fail to assert a compelling interest capable of overcoming that presumption are simply void.

A second reason for not revisiting *Red Lion* is that the case before the Court involves newspapers and not the broadcast media. Reliance upon that holding in this case would serve to solidify *Red Lion* in the face of a definite trend away from its holdings. If *Red Lion* is to be revisited, it should be within the perspective of a set of facts applicable to broadcasting and the fairness doctrine.

This Court noted in *Red Lion* that:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy

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[9] Red Lion, *supra* at 386.

> Although broadcasting is clearly a medium affected by a First Amendment interest, (citation omitted) differences in the characteristics of news media justify differences in the First Amendment standards applied to them. (footnote and citation omitted).

Id.

> or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. *Red Lion, supra* at 389.

Despite attempts by some to interpret this language in its broadest sense, this Court, in *Columbia Broadcasting*, rejected the claim that individuals and groups had a right to purchase advertising time to comment on public issues:

> The licensee policy challenged in this case is ultimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. *Columbia Broadcasting, supra* at 118 (Burger, C.J.)
>
> . . . .
>
> More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. *Id.* at 120.
>
> . . . .
>
> More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind

> of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. *Id.* at 120-121.

Thus, it seems apparent that the possible scope of the *Red Lion* decision has been limited by *Columbia Broadcasting*. Accordingly, any reliance upon *Red Lion* in determining the rights of the parties in the instant case would necessitate a step backwards in solidifying a decision which has since become subject to some modification. As was noted by Justice Stewart:

> *This Court was persuaded* in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. *Rightly or wrongly*, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent. And even if all else where in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: *If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom. Columbia Broadcasting, supra* at 146 (emphasis added). (Stewart, J., concurring).

NAB further opposes a revisiting of *Red Lion* at this time because it is apparent that the fairness doctrine, as embodied in that case, is likely to come under scrutiny

in the future. Justice Douglas, for one, has stated with respect to *Red Lion* that:

> I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. *Columbia Broadcasting, supra* at 154 (Douglas, J., concurring).

In *Brandywine-Main Line Radio, Inc. v. F.C.C.*,[10] Chief Judge Bazelon, in his dissenting opinion, questioned not only the application of the fairness doctrine to station WXUR, but also challenged certain of the precepts upon which the doctrine is founded. Thus, he stated that:

> . . . abridgement of individual rights may be tolerated only when in the long run it enhances the right of the public to receive access to the marketplace of diverse views. Obviously this requires a delicate balancing: any harm to private rights must be outweighed by benefit to the public. (footnote omitted). *Id.* at 66 (Bazelon, C. J., dissenting).

In considering the WXUR matter he noted that the imposition of the fairness doctrine did not serve to enhance access to the marketplace of diverse views:

> WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. (footnote om.) The station was purchased by Faith Theological Seminary

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[10] 473 F.2d 16 (D.C. Cir. 1972).

> to propogate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints. (footnote om.).
>
> The Commission's strict rendering of fairness requirements, as developed in its decision, (footnote om.) has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. *Id.* at 69 (Bazelon, C.J., dissenting).

Recognizing that the fairness doctrine is premised upon the scarcity of frequencies concept,[11] Judge Bazelon suggested that the time was ripe for a thorough review of the doctrine in light of the current state of broadcast technology:

> Whether in this case the Commission has simply taken the doctrine too far or applied it too rigidly, or whether the trouble lies deeper, cannot be determined without a remand. . . . Do fairness policies truly promote a marketplace of uninhibited, wide and robust debate? (footnote om.) It is

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[11] Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

Red Lion, supra at 389.

> proper that this court urge the Commission to reconsider this case in light of its fairness hearings; that we encourage the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances; that we ask whether an alternative does not suggest itself — whether, as with printed press, more freedom for the individual broadcaster would enhance, rather than retard, the public's right to a marketplace of ideas. *Id.* at 79-80 (Bazelon, C.J., dissenting).

Moreover, similar concerns have recently been expressed by Senator Sam Ervin, a leading constitutional authority and respected member of the United States Senate. Discussing the same WXUR case, he stated:

> The underlying rationale of the fairness doctrine is that since broadcasting outlets are so scarce, they must be regulated to insure balanced presentations of controversial issues. This is one assumption which can no longer be accepted without challenge. As of March 1973, there were a total of 7,399 radio stations broadcasting in this country. This compares with a total of 1,761 daily newspapers in circulation . . . . Most Americans, wherever they are situated, can receive numerous radio signals, and usually this means they can hear competing views. In Dr. McIntire's case, while WXUR was the sole radio station in Media, Pa., the town was located in the greater Philadelphia

> broadcasting area within the range of a myriad radio signals. . . . It is safe to say that the public in the Philadelphia area had a great variety of "respectable" views to listen to, but only from WXUR could it hear challenges to those views.[12]

As a remedy to this intolerable situation, Senator Ervin suggests that the fairness doctrine be operative only where there is present a scarcity of available radio signals. He would presume scarcity only in a locality served by less than four broadcasting signals or where competing views are in fact not being aired.[13]

The Senator's scheme may never be adopted, but his concern evidences a growing trend both in the courts, in the Congress and in the FCC itself that the fairness doctrine be subjected to further scrutiny. Accordingly, NAB respectfully submits that in light of that apparent trend, the principles of *Red Lion* respecting application of the doctrine to broadcasters should not be further encrusted in precedents set by this Court in the instant case.

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[12] 119 Cong. Rec. (reprint of daily ed. Nov. 14, 1973) at 2.

[13] *Id.* at 3.

CONCLUSION

For the foregoing reasons, NAB respectfully urges the Court to declare the Florida "right of reply" statute unconstitutional as an abridgement of the First Amendment. Moreover, we call upon the Court to so rule without reaffirming its holdings in *Red Lion*.

Respectfully submitted,

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I HEREBY CERTIFY that copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the National Association of Broadcasters have been served this day by mail upon each of the following:

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